

Program Policy
Issues Clarification Paper:
Pre-Existing Conditions

June 2016

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1. PURPOSE

The *Workers' Compensation Act* is clear that workers may be compensated for workplace injuries that are caused by a combination of occupational and non-occupational factors. However, Nova Scotia does not have a policy that outlines the criteria and principles that are applied when determining entitlement to compensation in these cases. Policy will help to ensure that entitlement decision-making for claims involving a pre-existing condition is done in a clear and consistent manner.

It is difficult to estimate the number of claims where pre-existing conditions play a significant role. However, as Nova Scotia's workforce ages, the likelihood a worker will have a pre-existing condition at the time of the workplace injury increases. Claim durations in Nova Scotia are amongst the highest in Canada, in part because pre-existing physical and psychological conditions can impact a worker's recovery and return to work.

This paper is intended to provide background information to the Stakeholder Working Group, assembled for a review of the issues surrounding compensable claims where a pre-existing condition may be contributing to a worker's workplace injury. We are asking members of the Working Group to help clarify areas of concern to ensure the WCB considers all issues as a new Pre-Existing Conditions Policy is drafted.

Considering the input from the Working Group, the WCB will then prepare a draft Pre-Existing Conditions Program Policy and background paper that will be distributed to key stakeholders and posted on the WCB's website allowing access to all interested Nova Scotians.

Through this policy development process, the WCB intends to establish clear and consistent principles, founded in best practice medical research, to assist the workers' compensation system and stakeholders to have clear understanding and expectations of the adjudication process.

A policy on pre-existing conditions would provide direction for decision-makers in terms of initial entitlement, and would also provide direction on determining work-relatedness of the ongoing impairment where there is evidence of a pre-existing condition and both the compensable injury and the pre-existing condition are contributing to ongoing impairment.

2. BACKGROUND

What is a Pre-Existing Condition?

A pre-existing condition is any condition that existed prior to a work-related injury, and may include injuries, diseases, degenerative conditions, and psychological conditions. The existence of the condition is confirmed by objective medical evidence.

Pre-existing conditions include, but are not limited to:

- Conditions that have produced periods of impairment/ disease requiring health care;
- Underlying or asymptomatic conditions which only become manifest after a workplace injury occurs; and,
- Work related permanent impairments for which the WCB has granted benefits.

Current practice

Section 10(5) of the *Workers' Compensation Act* (the "Act") is clear that that when a worker loses earnings in part because of a work place injury and in part to causes other than the injury (including a pre-existing disease or disability), she or he may receive benefits for the loss of earnings related to the injury. In these cases, the WCB typically considers it to be a temporary worsening at the initial stage of claim adjudication. As the claim progresses, if it is determined that the worker has a permanent worsening of their pre-existing condition, the worker will be assessed for a permanent impairment and benefits will be apportioned as per *Policy 3.9.11R1 Apportionment of Benefits* (Appendix B).

When the decision maker establishes the injury was work-related, the claim will be considered for compensation. This is the case even when there is a pre-existing condition that may have been worsened by the compensable injury. In other words, the existence of a pre-existing condition is not grounds to deny a claim.

Areas of concern

The WCB does not have a policy that specifically outlines what factors must be considered when adjudicating entitlement where a worker has a pre-existing medical condition that may be contributing to their overall injury or disability. While there is no policy, section 10(5) of the *Act* is clear that workers may be compensated for workplace injuries that are due partly to work and non-work factors. Additionally, if a permanent impairment results from a compensable

pre-existing condition, the WCB Policy 3.9.11R1— *Apportionment of Benefits Policy* provides direction in determining what portion of the permanent impairment is compensable.

Pre-existing conditions are frequent and becoming more common with an aging workforce who may have more complications in their medical history, including age-related conditions. Pre-existing psychological conditions are also becoming more common, and can impact the duration of claims.

Adjudicating claims with a pre-existing condition is complex, and without clear policy, case workers are not always able to adjudicate clearly or consistently. Inconsistent adjudication results in some claims being denied or closed, while other workers remain off work longer than medically necessary. Because the adjudication of these types of claims is complex, clear factors/guidelines for the adjudication of these claims is necessary and will promote transparency, accountability, and consistency.

The lack of a dedicated pre-existing conditions policy also effects ongoing claims management because there is not a consistent process for monitoring the work relatedness of the injury throughout the life of the claim. In other words, there is no consistent means for the case worker to determine when the pre-existing condition is no longer made worse by the compensable injury, and when the WCB is no longer responsible for further loss of earnings, medical aid, or rehabilitation in relation to the pre-existing condition.

In 2011, a requirement for clearer guidelines for how causation is determined when a pre-existing condition is worsened by a compensable injury, and for the adjudication of claims where a worker suffers from a pre-existing condition, was identified by both internal and external stakeholders. Additionally, the WCB Internal Audit has identified this as a critical risk in the Strategic Risk Profile – Working Document provided to the Board of Directors in October 2011. A pre-existing conditions program policy would address these concerns while providing clear direction for WCB adjudicators.

Law and Policy

Like any other claim, when a worker with a pre-existing medical condition makes a claim for compensation, the WCB must determine if they have suffered a personal injury by accident that arose out of and in the course of employment. To do this, WCB decision makers determine entitlement according to the *Act* and the program policies discussed below. All decisions are made on the real merits and justice of the claim, based on the facts of the case. Where the

evidence for and against the issue in a claim is approximately equal in weight, the *Workers' Compensation Act* stipulates the benefit of the doubt must be given to the worker.

Any claim must meet the entitlement criteria set out in the *Act* and in WCB policy, whether or not the worker has a pre-existing condition. Section 10(1) of the *Workers' Compensation Act* (the "*Act*") and *Policy 1.3.7 General Entitlement - Arising out of and in the Course of Employment* (Appendix A) state that to receive benefits and services from the WCB, a worker must have had an injury that was caused by work. For an injury to be work related it must generally: 1) happen while working and 2) be caused by a risk related to work.

3. ISSUES

Currently WCB decision makers are not directed by a specific policy on how to adjudicate claims with a pre-existing condition, either at the initial entitlement stage or throughout the life of the claim.

The first step in the adjudication of a claim is making a general entitlement decision: essentially, answering the question "was the worsening of the pre-existing condition causally linked to the compensable injury?" The consequences of this decision have important implications for the worker, employer, and the WCB. Without a policy, decision makers are not able to consistently answer this question when a worker has a pre-existing condition affecting their compensable injury and return to work.

Without clear direction for how to manage these claims, return to work may be either suggested too soon, or alternatively may be delayed because decision makers are not clear on how to determine whether the pre-existing condition is still a factor in the compensable injury.

The lack of policy creates inconsistencies in the following areas:

Diagnosis of a Pre-Existing Condition: What type of evidence is required to confirm the diagnosis of a pre-existing condition, in order for its impact to be considered in the adjudication of the compensable claim?

On-going Entitlement: How and when to re-evaluate the relationship between the pre-existing condition and the compensable injury throughout the life of the claim. This is important when considered with the requirement that a worker be returned to their "pre-accident state".

Temporary/Permanent Worsening: There is a lack of clarity for determining if a compensable injury is a temporary or permanent worsening of a pre-existing condition. This is critical as the WCB has fulfilled its responsibilities when either the temporary worsening of the pre-existing condition has returned to its usual state, or the permanent worsening of the pre-existing condition has been treated, and the effect on the injured worker's loss of earnings is established. The WCB is not responsible for the natural progression of a pre-existing condition. This is well established in other jurisdictions.

Impact on Recovery: In some situations, a pre-existing condition may be preventing the worker from recovering from a compensable injury or from maximizing their treatment. In these situations, decision makers need clarity around what the appropriate level of treatment for the pre-existing condition is to ensure they are able to recover from the compensable injury.

4. JURISDICTIONAL INFORMATION

Most jurisdictions in Canada have a legislative framework similar to Nova Scotia's. For example, in all jurisdictions (except Quebec¹) compensation is payable if a worker is injured, or dies, as a result of an accident that arose out of and in the course of employment.

From a policy perspective, all jurisdictions except Nova Scotia, Newfoundland and Labrador, and Quebec have dedicated policies to deal with the adjudication of claims where there is a pre-existing condition in addition to the compensable injury. Both of these other jurisdictions consider claims with a pre-existing condition through their existing policies and legislation, but without the clear direction provided by a standalone policy.

Each of the nine remaining jurisdictions has a standalone policy for pre-existing conditions. While each policy is unique, they primarily focus on the questions of how the worsening of the pre-existing condition is related to work, how it is affecting recovery, and when it is no longer causally linked to the compensable injury. The goal of safe and timely return to work is the same as for a compensable injury that does not involve a pre-existing condition, with the added focus on returning a worker to their "pre-accident state."

5. PROVIDING YOUR COMMENTS

¹ The requirement in the Quebec *Act* (in particular in the definition of "employment injury" and S. 20) is slightly different in that compensation is payable if a worker suffers an injury "arising out of or in the course of employment".

We would like to invite you to participate in a Stakeholder Working Group which will explore the issues surrounding workers' compensation claims involving a pre-existing condition. **In particular, we encourage you to consider whether there are any additional issues you would like to see addressed as the WCB considers creating a Pre-Existing Conditions Policy.**

To confirm your participation in the Working Group or if you have any questions prior to the Working Group meeting (date and location to be determined) please contact:

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Appendix A : General Entitlement – Arising out of and in the Course of Employment



POLICY

NUMBER: 1.3.7

Effective Date: September 17, 2009

Topic: General Entitlement – Arising out of and in the Course of Employment

Date Issued: September 24, 2009

Section: Entitlement

Date Approved by Board of Directors: September 17, 2009

Subject ion: General

PREAMBLE

The purpose of this program policy is to: 1) identify the basic requirements that must be met to be eligible to receive compensation benefits and services; and 2) describe the typical questions, general principles and sections of the *Workers' Compensation Act* (the "Act") the *Workers' Compensation Board* (the "WCB") considers in determining if a personal injury by accident "arose out of and in the course of employment".

DEFINITIONS

"accident", as defined in Section 2 (ae) of the Act, includes

- (i) a wilful and intentional act, not being the act of the worker claiming compensation,
- (ii) a chance event occasioned by a physical or natural cause, or
- (iii) disablement, including occupational disease, arising out of and in the course of employment, but does not include stress other than an acute reaction to a traumatic event.

POLICY STATEMENT

1. Real merits and justice of the case

Section 186 of the *Act* requires the WCB to base each general entitlement decision on the individual merits and justice of the case. The general principles and questions considered by the WCB, as outlined in this program policy, do not exclusively determine if an accident

arose out of and in the course of employment. Rather, they provide the WCB with a framework for gathering and considering evidence to guide general entitlement decision-making.

2. Basic eligibility requirements

To be eligible to receive compensation benefits and services a worker must:

- a) be a worker as defined by Section 2 (ae) of the *Act*;
- b) meet the requirements for filing a claim for compensation in Section 83 of the *Act*;
- c) be caused a personal injury by accident arising out of and in the course of employment as required by Section 10 of the *Act*; and
- d) depending on the facts of the claim, meet any other applicable Sections of the *Act*.

3. Determining if an accident arose out of and in the course of employment

The WCB generally considers the following principles and questions in determining if a personal injury by accident arose out of and in the course of employment.

a) Description of “arising out of” employment

The words “arising out of employment” refer to the origin of the cause of the injury. For an accident, and resulting injury, to be considered to have arisen out of employment there must be a causal connection between the worker’s employment and the injury they received.

Generally, this means the accident and resulting injury must be caused by some risk related to the employment. The risk may be directly, or incidentally, related to the employment; and the injury may be the result of a single incident, or develop over a period of time. An injury, however, is not necessarily compensable simply because it happened, or symptoms occurred, at the workplace.

b) Description of “in the course of” employment

Generally, an accident, and resulting injury, is considered to have arisen in the course of employment when it occurs under the following circumstances:

- i. at a time that is consistent with when the worker typically performs the employment, or at a time when the worker has been asked to perform activities for the employment;
- ii. at a place that is consistent with the employment or the employer’s premises; and
- iii. while performing an activity directly, or incidentally, related to the employment.

The time and place of an accident, however, are not strictly limited to the normal hours of employment or the employer’s premises; the forgoing are intended to be general principles.

c) Questions considered - “arising out of and in the course of employment”

In gathering evidence to determine if an accident, and resulting injury, arose out of and in the course of employment the WCB considers a series of questions that may include, but is not limited to, the following:

- i. Was the activity part of the job, or a job requirement?

- ii. Did the accident occur when the worker was in the process of doing something for the benefit of the employer?
- iii. Did the injury occur while the worker was doing something at the instruction of the employer?
- iv. Did the injury occur while the worker was using equipment or materials supplied by the employer?
- v. Was the injury caused by some activity of the employer or another worker?
- vi. Was the worker being paid or receiving some consideration for the activity from the employer at the time of the accident?
- vii. Was the worker on the employer's premises at the time of the accident?
- viii. Was the worker traveling for employment purposes at the time of the accident?
- ix. Did the workers' employment expose them to a greater risk of injury than they would have been exposed to as a member of the general public?
- x. Was the injury caused by an exposure in the workplace, or as part of the employment activities?

The WCB then:

- i. considers the evidence gathered throughout the claim adjudication process;
- ii. weighs the evidence;
- iii. applies the statutory presumption in Section 10(4) and the benefit of the doubt provision in Section 187 of the *Act* where circumstances warrant; and

determines whether an accident arose out of and in the course of employment.

4. Aggravation, activation, acceleration of pre-existing disease or disability and injuries due to other causes

As stated in Section 10(5) of the *Act*, where the WCB has determined a personal injury by accident has arisen out of and in the course of employment and resulted in a loss of earnings or permanent impairment that was either due:

- a) in part to the injury and in part to causes other than the injury; or
- b) to an aggravation, activation, or acceleration of a disease or disability existing prior to the injury;

compensation is payable for the proportion of the loss of earnings or permanent impairment that may be reasonably attributable to the injury.

Where Section 10(5) of the *Act* is applicable, the WCB apportions benefits in accordance with *Policy 3.9.11R - Apportionment of Benefits*.

5. Serious and willful misconduct

Section 10(3) of the *Act* provides that where a personal injury is attributable wholly or primarily to the serious and willful misconduct of the worker, the WCB shall not pay compensation to the worker unless the personal injury:

- a) results in death or serious and permanent impairment; or
- b) is likely, in the opinion of the Board, to result in serious and permanent impairment.

6. Presumption

As required in Section 10(4) of the *Act*, if it is determined that the accident arose out of employment, it is presumed the accident arose in the course of employment, unless there is evidence to the contrary. Alternatively, if it is determined that the accident arose in the course of employment, it is presumed the accident arose out of the employment, unless there is evidence to the contrary.

7. Benefit of the Doubt

Section 187 of the *Act* establishes that a worker is not required to provide proof on a civil standard (on a balance of probabilities) in support of a claim for compensation. Rather, a worker must establish, through the provision of evidence, that it is as likely as not that a personal injury arose out of and in the course of employment. Where there is doubt on an issue respecting a worker's claim for compensation, and it is as likely as not that the accident arose out of and in the course of employment, the issue will be resolved in the worker's favour.

8. APPLICATION

This program policy applies to new claims for compensation made on or after September 17, 2009.

9. REFERENCES

Workers' Compensation *Act* (Chapter 10, Acts of 1994-95), Sections 2 (a), 2(n), 2(ae), 10, 82, 83, 183, 186, and 187.

Executive Corporate Secretary

Appendix B – Apportionment of Benefits



POLICY

NUMBER: 3.9.11R1

Effective Date: April 10, 2008

Topic: Apportionment of Benefits

Date Issued: April 22, 2008

Section: Short-Term and Long-Term Benefits

Date Approved by Board of Directors: April 10, 2008

**Subject
ion: General**

PREAMBLE

Where a personal injury by accident arising out of and in the course of employment results in loss of earnings or permanent impairment due (a) in part to the injury and in part to causes other than the injury; or (b) to an aggravation, acceleration, or activation of a disease or disability existing prior to the injury, the WCB is directed by Section 10(5) of the *Workers' Compensation Act* ("the Act") to pay compensation for the proportion of the loss of earnings or permanent impairment that may reasonably be attributed to the injury.

The WCB has adopted the following Policy with respect to the effect of Section 10(5) on the amounts of compensation benefits payable.

DEFINITIONS

For the purpose of the Policy, the following definitions shall apply:

"aggravation", "acceleration", or "activation" means the clinical effect of a compensable injury on a pre-existing disease or disability resulting in a permanent increase in the impairment and/or loss of earnings capacity resulting from the pre-existing disease or disability;

"cause other than injury" means any aspect of the physical condition of an individual worker which, due to its nature or severity, could be reasonably expected to have a significant impact on the duration and/or the degree of a worker's loss of earnings or permanent impairment resulting from a compensable injury

"compensable injury" means a personal injury by accident arising out of and in the course of

employment;

“degenerative” means characterized by progressive, often irreversible, deterioration;

“disability” means the decreased capacity or loss of ability of an individual to meet personal, social or occupational demands;

“disease” means the specific pathophysiologic process involved, which gives rise to the worker’s signs and symptoms and their progression;

“exacerbation” means the clinical effect of a compensable injury on a pre-existing disease or disability resulting in a temporary increase in the impairment and/or loss of earnings capacity resulting from the pre-existing disease or disability;

“impairment” means the loss of, loss of use of, or derangement of any body part, system or function;

“non-compensable factor” means any condition unrelated to a compensable injury which may affect recovery and/or the extent of impairment/loss of earnings. A non-compensable factor may exist prior to a compensable injury or it may develop post-injury. This includes causes other than the injury and pre-existing diseases or disabilities;

“permanent impairment” means impairment associated with a permanent medical impairment and/or a pain-related impairment;

“permanent medical impairment” means any impairment that has become static or stabilized and that is unlikely to improve despite further medical treatment. A permanent medical impairment also accounts for the usual pain that accompanies the type of injury and resulting impairment;

“pain-related impairment” means impairment associated with chronic pain.

“pre-existing disease or disability” means a non-compensable disease or disability which existed prior to the compensable injury.

POLICY STATEMENT

1. Temporary Earnings Replacement Benefit (TERB)

1.1 Where:

- (a) the compensable injury causes an exacerbation or aggravation, acceleration or activation of a pre-existing disease or disability; or
- (b) the loss of earnings is due in part to the compensable injury and in part to a non-compensable factor which developed post-injury,

the WCB will assume full responsibility for TERB without apportionment as long as there are medical findings to substantiate that the compensable injury is contributing to some degree to the loss of earnings, even if a non-compensable factor(s) is

prolonging recovery and/or loss of earnings.

- 1.2 Where a worker is unable to commence or continue medical treatment for a compensable injury due to a non-compensable factor, the WCB will apply Policy 1.3.2R (Interruption of Medical Treatment – Circumstances Beyond Worker’s Control).

2. Medical Aid

- 2.1 Medical aid required as a result of the compensable injury will not be subject to apportionment.

3. Vocational Rehabilitation

- 3.1 Where the WCB determines that no proportion of a worker’s permanent impairment can be attributed to a compensable injury, vocational rehabilitation services will not be offered to the worker.

- 3.2 Where:

- (a) the compensable injury causes an aggravation, acceleration or activation of a pre-existing disease or disability; or
- (b) the anticipated permanent impairment is due in part to the compensable injury and in part to a non-compensable factor(s) which developed post-injury,

and medical evidence indicates that a proportion of the anticipated long-term loss of earnings can be attributed to the compensable injury, vocational rehabilitation services will be provided to the worker in accordance with normal guidelines, without apportionment.

4. Permanent Impairment

- 4.1 Where a non-compensable factor(s) is contributing to the worker’s permanent impairment, the permanent impairment may be adjusted to reflect the impact of this non-compensable factor(s). Permanent impairment benefits will only be paid for the permanent impairment resulting from the compensable injury.

- 4.2 To determine the impact of the non-compensable factor(s) on the permanent impairment:

- (a) the WCB will gather evidence which can include, but is not limited to:

- Physician chart notes;
- Specialist reports;
- Diagnostic test results (i.e. x-ray, CT scan, MRI);

- Physiotherapy, chiropractor and occupational therapy reports;
 - Accident Report;
 - Information from disability insurance providers and/or the employer;
 - Employment-related information.
- (b) if the non-compensable factor(s) is degenerative in nature, the WCB will gather medical evidence with respect to how the condition would have progressed (up to the point of assessing permanent impairment) in the absence of the compensable injury.

4.3 Where:

- (a) the compensable injury causes an aggravation, acceleration or activation of a pre-existing disease or disability; or
- (b) the permanent impairment is due in part to the compensable injury and in part to a non-compensable factor(s) which developed post-injury

the WCB will determine the portion of the permanent impairment that is compensable in the following ways:

4.3.1

- (a) Determine the total permanent impairment rating using the applicable permanent impairment rating schedule in accordance with Policy 3.3.2R2 (Permanent Impairment Rating Schedule).
- (b) Assign the impairment that results from the non-compensable factor(s) a permanent impairment rating and subtract this from the total permanent impairment rating to determine the portion of permanent impairment that is compensable.

4.3.2

- (a) If it is not possible to apply Policy Statement 4.3.1(b), determine the degree of permanent impairment that results from the non-compensable factor(s) by applying the following definitions:

“Minor” refers to an impairment which produced no or minimal limitations on working capacity but required occasional medical care.

“Moderate” refers to an impairment which produced some limitations on working capacity and required periodic medical care.

“Major” refers to an impairment which produced significant limitations on working capacity requiring ongoing medical care.

“Severe” refers to an impairment which produced significant limitations on working capacity, requiring ongoing medical care and would certainly have

resulted in total disability independent of the compensable injury.

- (b) Determine the portion of permanent impairment that is compensable by multiplying the total permanent impairment rating by the percentage from the table below which corresponds to the applicable definition:

Classification of Non-Compensable Factor(s)	Compensable Percentage of Permanent Impairment
Minor	100% (no apportionment)
Moderate	75%
Major	50%
Severe	25%

5. Extended Earnings Replacement Benefit (EERB)

5.1 Where the worker is experiencing an on-going loss of earnings as a result of the permanent impairment remaining after the compensable injury, the WCB will determine what proportion of the loss of earnings can be attributed to the compensable injury and what proportion can be attributed to a non-compensable factor(s). EERBs will only be paid for the on-going loss of earnings resulting from the compensable injury.

5.2 Where the WCB determines that a non-compensable factor was only a latent weakness or susceptibility and there is no evidence: (a) that it had any impact on the worker's pre-injury earning capacity; or (b) that it would have progressed to produce loss of earning capacity without the occurrence of the compensable injury, it will be considered that the entire extended loss of earnings can be attributed to the compensable injury and EERBs will be paid without apportionment under Section 10(5) of the *Act*.

5.3 The WCB will determine the portion of the extended loss of earnings that is compensable in the following way:

5.3.1 Determine the total extended loss of earnings in accordance with normal guidelines.

5.3.2 Determine the portion of extended loss of earnings that is compensable by multiplying the total extended loss of earnings by the percentage from the table below which corresponds to the applicable definitions for the non-compensable factor:

Classification of Non-Compensable Factor(s)	Percentage of Extended Loss of Earnings Payable
Minor *	100% (no apportionment)
Moderate *	75%
Major *	50%
Severe *	25%

* As determined in accordance with Section 4.3.2 of this Policy

6. Death/Survivors' Benefits

- 6.1 If the WCB determines that a compensable injury was a factor contributing to a worker's death, death and survivors' benefits are payable in the full amounts provided for in the Act, without apportionment, since such benefits are not paid as compensation for loss of earnings or permanent impairment.

APPLICATION

This policy replaces Policy 3.9.11R issued on September 13, 2004 and effective September 10, 2004. This Policy applies to all decisions made on or after April 10, 2008.

REFERENCES

Workers' Compensation Act (Chapter 10, Acts of 1994-95), Section 10(5)

Executive Corporate Secretary

Appendix C – Workers’ Compensation Act Sections 10(1) and 10(5)

10 (1) Where, in an industry to which this Part applies, personal injury by accident arising out of and in the course of employment is caused to a worker, the Board shall pay compensation to the worker as provided by this Part.

10 (5) Where a personal injury by accident referred to in subsection (1) results in loss of earnings or permanent impairment (a) due in part to the injury and in part to causes other than the injury; or (b) due to an aggravation, activation or acceleration of a disease or disability existing prior to the injury, compensation is payable for the proportion of the loss of earnings or permanent impairment that may reasonably be attributed to the injury.